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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 614

STATE OF WISCONSIN, ex rel
WISCONSIN LUTHERAN HIGH
SCHOOL CONFERENCE,

Appellant,

vs.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

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STATEMENT AS TO JURISDICTION

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

(a) Reported Opinion in Court Below

The opinion of the court below, the Supreme Court of the State of Wisconsin, is reported in Volume 267 of the Wisconsin Reports, page 91, and in Volume 65 of the Northwestern Reporter, 2d, page 43.

(b) Grounds of Jurisdiction

The grounds on which the jurisdiction of this court is invoked are the following:

(i) Nature of the Proceeding

The nature of the proceeding is an appeal by the State of Wisconsin, ex rel Wisconsin Lutheran High School Conference, from the final judgment of the Supreme Court of the State of Wisconsin denying a motion of the Appellant for rehearing of an order and judgment previously entered by the Supreme Court of Wisconsin, wherein it reversed a judgment entered in the Circuit Court of Milwaukee County, Wisconsin, and directed that a peremptory writ of mandamus issued by said Circuit Court, pursuant to its judgment, be quashed.

The statute pursuant to which the appeal is brought is 28 U.S.C. Sec. 1257(2).

(ii) Pertinent Dates

The judgment or decree of the Supreme Court of Wisconsin sought to be reviewed was dated and entered on June 8, 1954. The order denying Appellant's motion for a rehearing was dated and entered on October 5, 1954. The notice of appeal was filed on December 28, 1954, in the Circuit Court of Milwaukee County, Wisconsin, which is the court which was then possessed of the record.

(iii) Statutory Provision Relied Upon for Jurisdiction

The statutory provision believed to confer upon the Supreme Court of the United States jurisdiction of the appeal is Sec. 1257(2) of Title 28 of the United States Code, in that there is drawn in question the validity of a statute of the State of Wisconsin (specifically, an ordinance of the City of Wauwatosa, Wisconsin) on the

ground of its being repugnant to the Constitution of the United States; the decision and judgment of the highest court of the State of Wisconsin having been in favor of its validity.

(iv) Cases Supporting Jurisdiction

The following cases are believed to sustain the jurisdiction:

To the point that a city ordinance is a "statute of the state" within the meaning of Sec. 1257(2) of Title 28:

Jamison v. Texas
318 U.S. 413, 87 L.ed. 869, 63 Sup. Ct. 669

King Manufacturing Co. v. Augusta
277 U.S. 100, 72 L.ed. 801, 48 Sup. Ct. 489.

To the point that the Supreme Court of the United States has jurisdiction to review, upon appeal, a determination of the highest court of a state in favor of a state statute which is claimed to be in conflict with the Constitution of the United States as applied to a particular factual situation:

Dahnke-Walker Milling Co. v. Bondurant
257 U.S. 282, 66 L.ed. 239, 42 Sup. Ct. 106

Fiske v. Kansas
274 U.S. 380, 385, 71 L.ed. 1108, 47 Sup. Ct. 655.

(v) Text of the City Ordinance

The city ordinance whose validity is involved in the case is Sec. 14.03(1) of the Zoning Ordinance of the City of Wauwatosa, Wisconsin, which reads as follows:

"Section 14.03. 'A' RESIDENCE DISTRICT REGULATIONS.

(1) Use: No building or premises shall be used and no building shall be hereafter erected or altered within any 'A' Residence District, unless otherwise provided in this Ordinance, except for the following uses:

(a) Single Family Dwellings.

(b) Municipal Utilities and Buildings.

(c) Community Center Buildings.

(d) Churches and Temples of Worship.

(e) Public Schools and Private Elementary Schools.

(f) Public Libraries and Museums.

(g) Telephone Exchanges.

(h) Parks, Recreation Buildings and Country Clubs not conducted as a business or for profit.

(i) Railroad or Electric Right-of-Way utilized for any purpose essential to the operation of the railroad or utility, but not including any privately operated business or industry.

(j) Temporary Buildings and uses for construction purposes for a period not to exceed 1 year.

(k) Accessory uses incident to the above uses, including private garages, professional offices, home occupations, and signs not more than 12 square feet in area advertising premises for sale or rent, but not including the conduct of any retail or wholesale business or manufacture."

(c) Question Presented by the Appeal

The question presented by the appeal is whether Sec. 14.03(1) of the Zoning Ordinance of the City of Wau-

watosa violates Sec. 1 of the 14th Amendment to the Constitution of the United States (1) by denying to the relator the equal protection of the laws, in that said section of the ordinance permits the use and erection of a public high school in an "A" residence district but prohibits the use and erection of a private high school on the relator's land in such district; and (2) by depriving the relator of property without due process of law, in that said section of the ordinance prohibits the construction, maintenance and operation of a private high school on the relator's land located in an "A" residence district of the City of Wauwatosa.

(d) Statement of the Case

The Supreme Court of Wisconsin on June 8, 1954 reversed a judgment of the Circuit Court of Milwaukee County which had directed the issuance of a writ of mandamus compelling the defendant building inspector of the City of Wauwatosa to issue a building permit for the erection of a high school building on land in which the relator had an interest, in the City of Wauwatosa. A motion by the plaintiff for rehearing was denied by the Supreme Court of Wisconsin on October 5, 1954. Thereupon the record in the action was remanded to the Circuit Court of Milwaukee County; and the plaintiff has filed in that court its notice of appeal to the Supreme Court of the United States.

The action of mandamus was commenced in the Circuit Court of Milwaukee County because the building inspector had refused a building permit for the relator's proposed high school building on the ground that the erection and operation of such a high school would violate Sec. 14.03(1) of the Zoning Ordinance of the City

of Wauwatosa. The land in which the relator had an interest, and on which it planned to erect its high school, is located in an "A" residence district as defined in the zoning ordinance. Sec. 14.03(1) of the ordinance permits public high schools but not private high schools in an "A" residence district.

An alternative writ of mandamus was issued pursuant to the petition. The defendant building inspector moved to quash the alternative writ, but the motion was denied by the Circuit Court. He then filed a return to the writ setting up the ordinance as justification for his denial of the building permit. Meanwhile an owner of residential property in the vicinity of the proposed high school had been permitted by the court to intervene as a defendant, and he filed an answer to the petition for the alternative writ, in which he likewise set up the ordinance as a defense to the mandamus action. The plaintiff demurred to both the building inspector's return and the interpleaded defendant's answer. Both demurrers were sustained by the Circuit Court, which thereupon entered judgment directing the issuance of a peremptory writ of mandamus. From that judgment the defendant building inspector and the interpleaded defendant appealed to the Supreme Court of Wisconsin, and that court reversed the judgment and directed that the writ of mandamus be quashed.

The petition for the writ of mandamus alleged that Sec. 14.03(1) of the Wauwatosa zoning ordinance was "unconstitutional and void in that it is arbitrary, discriminatory, unfair, unreasonable and does not promote the health, safety, morals or general welfare of the community"; and further alleged that "the erection of a high school by the petitioner will not in any way detrimentally affect either the public health, safety, morals or general

welfare of the community." The answer of the interpleaded defendant specifically denied these allegations. The return of the defendant building inspector to the writ alleged that Sec. 14.03(1) "and particularly the provision excluding private secondary schools from Class 'A' residence districts, is substantially related to the public welfare of the City of Wauwatosa and is therefore a proper and valid exercise of its police power." Both the answer and the return contained various factual allegations in support of the validity of the ordinance, which may be summarized as follows: (1) that the ordinance had been in force for over twenty-five years, whereas the relator's acquisition of the land was only recent; (2) that the relator's proposed high school would have a capacity of 500 students, of whom not more than thirty to forty would be residents of Wauwatosa and the remainder would come from neighboring communities, particularly the adjoining city of Milwaukee; (3) that the proposed high school site consists of thirteen acres whose natural use would be for a residential development that would substantially increase the taxable real estate value of the city and would produce large tax revenues for the city, whereas the erection of a private high school on the tract would remove the tract from the tax rolls and would also depreciate the taxable value of the expensive homes in the vicinity; (4) that the construction of the high school would result in traffic hazards and parking congestion; and that the use of the appurtenant athletic field with its attendant noises and night lights would tend to depreciate the value of surrounding residential property; (5) that the City of Wauwatosa already has adequate public high schools, none of which are located in "A" residential districts; (6) that secondary schools in congested residential districts result in physical damage to surrounding

residential property by reason of the trampling and littering of lawns, gardens and shrubbery; (7) that the construction of the high school would require the city to provide additional services such as traffic patrol, fire, health and building inspection, and that the saving in school maintenance on the part of the city would be insignificant as compared with the loss of revenue and increased cost to the city.

As appears from the foregoing, the method of raising the federal question now sought to be reviewed was by allegation in the petition for mandamus that the ordinance was unconstitutional and void; denial of such allegation in the return to the writ and the answer of the interpleaded defendant; and demurrer by the plaintiff to the return and the answer. The manner in which the federal question was passed upon by the trial court was by sustaining the plaintiff's demurrers to the return and the answer, and entering judgment in favor of the plaintiff. The manner in which the federal question was passed upon by the Supreme Court of Wisconsin was by reversing the judgment of the Circuit Court and directing that the writ of mandamus be quashed. The opinion handed down by the Supreme Court of Wisconsin addressed itself specifically and exclusively to the constitutional question, stating (267 Wis. at page 96, 65 N.W. 2d at page 46):

> "Respondent submits, therefore, that there is no difference in the effect on the community between the permitted public high school and the prohibited private one and hence the ordinance's discrimination between them is unreasonable, not founded on a difference in fact material to the object sought to be attained by building ordinances, and is a measure which denies to respondent the equal protection of the laws and deprives it of property without due process of law, contrary to the provisions of the

> Fourteenth amendment of the United States constitution. Therefore, it asserts, so far as this case is concerned, the ordinance is void."

The conclusion of the majority of the court (267 Wis. at page 101, 65 N.W. 2d at page 48) was —

> "that no unconstitutional or otherwise illegal discrimination appears in the Wauwatosa zoning ordinance by reason of its exclusion of private high schools from 'A' residence zones while accepting public schools of the same rank. Consequently, the refusal of appellant building inspector to issue a building permit for the erection of respondent's private high school was proper and must be sustained."

Two of the seven justices of the Wisconsin Supreme Court dissented, and in their dissenting opinion they concluded (267 Wis. at page 104, 65 N.W. 2d at page 50) —

> "that the barring of respondent's contemplated project by this zoning ordinance is discriminatory, arbitrary, and unreasonable and clearly violative of sec. 1, art. 1 of the Wisconsin constitution and contrary to art. 1 of the Fourteenth amendment of the federal constitution and therefore void."

(e) Substantial Character of the Federal Questions

That the federal questions involved in this case are so substantial as to require plenary consideration, with briefs on the merits and oral argument, is established by the following facts and considerations:

First, as to denial of the equal protection of the laws. The ordinance under attack permits public high schools but prohibits private high schools in an "A" residential area. The Wisconsin Supreme Court in its decision in this case admitted that this discrimination was not sus-

tainable on any of the grounds set out in the return of the defendant building inspector or the answer of the interpleaded defendant; namely, the traffic congestion, the crowds and bright lights at athletic contests, the increased tax burden by removal of the property from the city tax roll, and the diminution in value of neighboring homes. "Each such discordant feature", the court said (267 Wis. at page 96, 65 N.W. 2d at page 46) "attends the presence of a public school to an equal degree." But the court went on to discover and apply to the case before it an additional differentiation between the public and the private high school, which the court held to be a sufficient basis for the discrimination in the ordinance: namely, the fact that a public high school is open to everyone in the district of fit age and educational qualifications, while a private high school selects its students. On that ground alone, the Supreme Court of Wisconsin sustained the validity of the ordinance. The reasoning of the court appears from the following excerpts from its opinion (267 Wis. at page 98, 65 N.W. 2d at page 47):

> "Whether the private school is sectarian or commercial, though it now complains of discrimination, in its services it discriminates and the public school does not. Anyone in the district of fit age and educational qualifications may attend the public high school. It is his right. He has no comparable right to attend a private school. To go there he must meet additional standards over which the public neither has nor should have control. The private school imposes on the community all the disadvantages of the public school but does not compensate the community in the same manner or to the same extent. If the private school does not make the same contribution to public welfare this difference may be taken into consideration by the legislative body in framing its ordinance. If education offered by a school to the residents of an area without discrimination is con-

> sidered by the council to compensate for the admitted drawbacks to its presence there, that school may be permitted a location which is denied to another school which does not match the offer, and we cannot say that such a distinction is arbitrary or unreasonable or that such discrimination between the two schools lacks foundation in a difference which bears a 'fair, substantial, reasonable, and just relation' to the promotion of the general welfare of the community, which is the statutory purpose of zoning laws in general and of the ordinance in question."

This position taken by the Supreme Court of Wisconsin squarely raises the question whether a *zoning* ordinance, enacted in the exercise of the city's police power and finding its justification in the promotion of health, safety, morals or general welfare (*Euclid v. Amber Realty Co.*, 272 U.S. 365, 387, 395, 71 L.ed. 303, 310, 314, 47 Sup. Ct. 114, 118, 121), can constitutionally discriminate between private and public high schools solely on the ground that the public high school is open to everyone while the private high school selects its students. That difference might very well be germane to certain kinds of statutory differentiations, such for example as required curriculum or qualifications of teachers; but is it germane to the authorized purposes of a *zoning* regulation? Plaintiff earnestly contends that it is not, and that the Supreme Court of Wisconsin has confused two very different things when it sustains a discriminatory *police power* regulation on the basis of differences which have no relation whatever to the exercise of the police power.

The substantiality of the federal question with respect to denial of equal protection of the laws is further evidenced by the fact that every other state court of last resort that has spoken on the subject has found a discriminatory ordinance of this kind to be in violation of

the 14th Amendment. Certainly the federal objection to these ordinances must be admitted to be at least *substantial* when the courts of this country (other than the Wisconsin court) have found it, without dissent, to be *insurmountable*. The Supreme Court of Wisconsin admitted that two of these other cases are indistinguishable from the present case, saying (267 Wis. at pages 96-97, 65 N.W. 2d at page 46):

> "These are cases whose facts are practically identical with the present one. In them the respective courts held that there was no substantial difference between public and private schools in relation to the object sought to be accomplished by the zoning ordinance and therefore, in so far as it prohibited the presence of a private school while allowing a public one, it was void. If these decisions were controlling authority upon us we would necessarily affirm the learned trial court for we cannot distinguish them from ours in any material respect."

The two cases thus referred to by the Wisconsin court are *Catholic Bishop of Chicago v. Kingery* (1939), 371 Ill. 257, 20 N.E. (2d) 583, and *Miami Beach v. State ex rel. Lear* (1937), 128 Fla. 750, 175 So. 537. In the Illinois case a unanimous Supreme Court held that an ordinance which permitted public schools in an "A" residential district but prohibited private schools therein "bears no substantial relationship to the promotion of the public health, safety, morals or welfare" but constitutes on the contrary "a capricious invasion of the property rights of the appellee, and as such cannot be sustained." In the Florida case a unanimous Supreme Court, dealing with an ordinance which permitted public schools but prohibited private schools in a designated area, held that "the prohibited classification finds no foundation in reason or experience that has been brought to our attention." The

following further statement of the Florida court points up the present plaintiff's contention that the differences between a public and a private school, in order to sustain an ordinance that discriminates against the latter, must be not mere differences of educational policy or administration but must be germane to the exercise of the police power in the interest of public safety, health, morals or general welfare:

> "What objectionable characteristics touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in greater degree as to a public school has not been suggested, and, we think, for the very good reason that none exists. For this reason alone the ordinance as amended must be held to be arbitrary."

In addition to the Florida and Illinois cases which were acknowledged by the Wisconsin Supreme Court as authority squarely in favor of the plaintiff, there are three other cases equally in point and equally favorable to the plaintiff.

In *Phillips v. Homewood* (1951), 255 Ala. 180. 50 So. 2d 267, the court held that a city ordinance which permitted public schools but prohibited private schools in a particular area was unconstitutional as "an arbitrary and discriminatory classification", and further stated that "no case or authority to the contrary has been cited to us and we have found none."

In *State v. Northwestern Preparatory School* (1949), 228 Minn. 363, 37 N.W. 2d 370, an ordinance which permitted public and parochial schools but prohibited non-parochial private schools was held to violate the equal protection clause of the 14th Amendment. The court said:

> "While ownership, some of the subjects taught, and the discipline enforced may be different in each from

> what they are in the others, a private school has no effect upon a residential area different from that of a public or parochial one. The distinction is based solely upon ownership. Such a distinction bears no relation to the purposes of the ordinance, and for that reason is arbitrary."

The third case, *Roman Catholic Welfare Corporation of San Francisco v. Piedmont*, 278 Pac. 2d 943, was decided by the District Court of Appeal of California on January 24, 1955 but is not yet reported. The court held that a zoning ordinance of the City of Piedmont which prohibited the conduct of any school except a public school in "Zone A" was unconstitutional as against a Roman Catholic organization which desired to erect a parochial school on real estate owned by it in "Zone A." The court said:

> "It is settled that parents have the basic constitutional right to have their children educated in schools of their own choice, subject to reasonable regulations as to subjects required to be taught, manner of instructions, etc. (Pierce v. Society of Sisters, 268 U.S. 510). Having this basic right in mind no reasonable ground for permitting public schools to be conducted in Zone A and prohibiting all other schools teaching the same subjects to the same age groups can be suggested. The question has not before been passed upon by the California courts but the courts of other jurisdictions have been unanimous in striking down similar legislation. [Citations] The rationale of these decisions is that no reasonable basis of classification exists between, or among, schools furnishing the same type of education to the same class of students."

If all these courts in five states have found it impossible to sustain an ordinance similar to the one here under attack, as against the requirement of equal protection of the laws in the 14th Amendment, certainly it cannot be

doubted that the federal question with respect to the validity of this ordinance is at least sufficiently "substantial" to warrant examination and decision by the Supreme Court of the United States—particularly when it is noted that the Wisconsin decision here appealed from is the only one in which such an ordinance has ever been held valid.

In addition to the federal question arising by reason of the denial of equal protection of the laws, the present litigation involves a further substantial federal question as to whether the absolute prohibition of a private high school in an "A" residential district does not deprive the relator of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. A case squarely in point on that subject is *Roman Catholic Archbishop v. Baker* (1932), 140 Ore. 600, 15 Pac. 2d 391, involving a denial of a building permit for the erection of a parochial school in a residence district. The Supreme Court of Oregon unanimously held that the denial of the permit was an arbitrary deprivation of property, saying:

> "The right to own carries with it the right to use that property in any manner that the owner may desire so long as such use will not impair the public health, peace, safety or general welfare. The kind of school proposed to be erected will not interfere with the public health; it cannot affect the public peace; it surely will not endanger the public safety; and by all civilized peoples an educational institution, whose curriculum complies with the state law, is considered an aid to the general welfare. These propositions cannot be successfully disputed. It is not a question alone of what monetary damage plaintiff may sustain, but also a question of the invasion of one of the plaintiff's inherent rights."

If exclusion of a private school from a particular district in a city is permissible, it is only a short step to the exclusion of such a school from the city as a whole. That such exclusion would be unconstitutional as a violation of the due process clause of the 14th Amendment was specifically held by the Supreme Court of Michigan in *Mooney v. Orchard Lake* (1952), 333 Mich. 389, 52 N. W. 2d 308, with abundant citation of supporting authority. The same conclusion has been reached with regard to the closely related subject of the exclusion of churches from a residential district. Leading cases are *State ex rel. Synod of Ohio v. Joseph* (1942), 139 Ohio St. 229, 39 N.E. 2d 515, and *State ex rel. Roman Catholic Bishop of Reno v. Hill* (1939), 59 Nev. 231, 90 Pac. 2d 217. In both of these cases the complete prohibition of churches in a particular area was expressly held to be in violation of the due process clause of the 14th Amendment, as against the religious organizations who owned land on which they desired to erect churches.

The proposition that a zoning ordinance which bears no substantial relation to the public health, safety, morals or general welfare is unconstitutional as a taking of property without due process has been affirmed in many cases, of which perhaps the most recent is *American University v. Prentiss* (1953), 113 Fed. Supp. 389, affirmed in *Prentiss v. American University* (1954), 214 Fed. 2d 282, certiorari denied on December 6, 1954 in *Wrather v. American University*, 75 Sup. Ct. 217.

In the light of these authorities it is submitted that the federal question under the due process clause, as well as the federal question under the clause relating to equal

protection of the laws, is a substantial question justifying the entertainment of the present appeal by the court.

Respectfully submitted,

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APPENDIX "A"

(h) Copies of Opinions

There is appended hereto, a copy of the majority opinion of the Supreme Court of the State of Wisconsin delivered upon the rendering of the judgment reversing the orders and judgment of the lower court and sustaining the validity of the ordinance in question, together with a copy of the dissenting opinion of Justice Steinle, in which Justice Broadfoot concurred. There was no opinion delivered by the Court in connection with the rendering of the order denying the motion for rehearing.

There is also appended, a copy of the opinion and decision of Otto H. Breidenbach, Judge of the Circuit Court of Milwaukee County, Wisconsin, delivered upon the rendering of the order denying the motion of Appellee, Sinar, to quash the Alternative Writ of Mandamus; and opinion and decision of William C. O'Connell, Judge Presiding, of the Circuit Court of Milwaukee County, Wisconsin, delivered upon the rendering of the order sustaining Appellant's demurrers to the return of the Appellee, Sinar, and to the answer of the Appellee, Vanderjagt; and granting to Appellant the relief demanded in its petition.

STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1953

No. 263

STATE ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,

Respondent,

v.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa,

Appellant,

E. L. VANDERJAGT,

Interpleaded Defendant.

APPEAL from orders and a judgment of the circuit court for Milwaukee county: WILLIAM C. O'CONNEL, Circuit Judge. *Reversed.*

Action in mandamus brought by plaintiff-respondent which is a private, non-profit corporation and, for the purposes of this opinion, is an owner of land in a class "A" residence zone of the city of Wauwatosa. Its action sought to compel the defendant-appellant Sinar, as building inspector of the city, to issue a permit for the construction of plaintiff's private high school with appurtenant athletic grounds and facilities. The building inspector had previously denied an application for such permit on the ground that the proposed use of the premises is not allowed by the zoning law of the city of Wauwatosa which he has the duty to administer. He filed a motion to quash

the alternative writ and, after hearing, the motion was denied by Otto H. Breidenbach, circuit judge, but with leave to file a return to the writ, which was done. In the meantime, E. L. Vanderjagt, a Wauwatosa resident, property owner and taxpayer, was interpleaded and filed an answer to plaintiff's petition. Plaintiff interposed a general demurrer to both the return and the answer.

After a hearing the demurrers were sustained and an order entered directing the entry of judgment and the issuance of a peremptory writ of mandamus. Judgment was entered and the writ issued but execution stayed pending appeal. Defendants appeal from the order denying the motion to quash, the order sustaining the demurrers, and from the judgment entered and docketed on the 10th day of December, 1953. At present there is no high school, public or private, in the class "A" residence zone.

Other material facts will be stated in the opinion. For convenience the arguments advanced by the defendants severally will be treated as though made jointly.

BROWN, J. Ch. 62, Stats. is the General Charter Law for the government of cities below the first class. The city of Wauwatosa is a city of the third class and is subject to ch. 62. Sec. 62.23(7), pars. (a), (b), and (c), Stats. grants to cities the power to zone their areas, as follows:

> "(a) *Grant of power.* For the purpose of promoting health, safety, morals or the general welfare of the community, the council may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes pro-

vided that there shall be no discrimination against temporary structures. This subsection and any ordinance, resolution or regulation, heretofore or hereafter enacted or adopted pursuant thereto, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. It shall not be deemed limitation of any power elsewhere granted.

"(b) *Districts.* For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts.

"(c) *Purposes in view.* Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

Pursuant to this authority the common council of Wauwatosa adopted a zoning ordinance whose provisions, material to this action, are as follows:

"5. That Section 14.03(1) of said Zoning Code defines 'A' Residence District Regulations as follows:

"(1) Use: No building or premises shall be used and no building shall be hereafter erected or altered within any 'A' Residence District, unless otherwise provided in this ordinance, except for the following uses:

"(a) Single Family Dwellings.

* * *

"(e) Public Schools and Private Elementary Schools."

The constitutionality of the general power of the state to zone property in the public interest is well established. It is a police power and it may be delegated by the state to the cities. *State ex rel. Tingley v. Gurda* (1932), 209 Wis. 63, 243 N.W. 317, *State ex rel. Carter v. Harper* (1923), 182 Wis. 148, 196 N.W. 451. Like other examples of regulation under the police power, a specific zoning ordinance must meet the constitutional demands of due process and the equal protection of the law. It must "* * * provide those in similar circumstances, among whom no reasonable basis for distinction exists, with equal protection of the law, as is constitutionally required of all ordinances as well as statutes." 8 McQuillin, Mun. Corp. (3d ed.), p. 106, sec. 25.61.

Reference to sec. 14.03(1)(e) of the ordinance discloses that the erection of public high schools is permitted and the erection of private schools above the elementary rank is forbidden in the "A" residence district. The defendant inspector relied on this prohibition in refusing to issue a building permit to the plaintiff.

The power to zone is granted to cities in order to promote the "health, safety, morals or the general welfare of the community." Sec. 62.23(7)(a), Stats., *supra*. We have recognized that the term "general welfare" includes considerations of public convenience, and general pros-

perity. *State ex rel. Carter v. Harper, supra.* The means adopted to promote these ends must, of course, bear a reasonable relation to the declared purpose. Id., p. 152. *Nectow v. Cambridge,* (1928), 277 U.S. 183, 48 Sup. Ct. 477, 72 L. Ed. 842. Appellants have made it abundantly clear that respondent's projected school has many features which seriously impair the social and economic benefits to the entire community which the zoning law is designed to preserve and promote. It will add to the congestion of the surrounding streets. Athletic events will bring noisy crowds and if the contests are held at night, there will be bright lights to interfere with the peace and comfort of the neighborhood. The school property will be taken from the tax roll, thus increasing the financial burden of the city's taxpayers. The presence of the school will lessen the taxable value of nearby homes and will deter the building of new homes in the area. Other detriments are easily thought of. But, as respondent points out, each such discordant feature attends the presence of a public school to an equal degree.

Respondent submits, therefore, that there is no difference in the effect on the community between the permitted public high school and the prohibited private one and hence the ordinance's discrimination between them is unreasonable, not founded on a difference in fact material to the object sought to be attained by building ordinances, and is a measure which denies to respondent the equal protection of the laws and deprives it of property without due process of law, contrary to the provisions of the Fourteenth Amendment of the United States Constitution. Therefore, it asserts, so far as this case is concerned, the ordinance is void.

" * * * a classification to be valid must always rest on a difference which bears a fair, substantial, natural, reason-

able, and just relation to the object, act, or persons in respect to which it is proposed." 12 Am. Jur., Constitutional Law, p. 153, sec. 481. Respondent cites *Catholic Bishop of Chicago v. Kingery* (1939), 371 Ill. 257, 20 N.E. (2d) 583, and *Miami Beach v. State ex rel. Lear* (1937), 128 Fla. 750, 175 So. 537. These are cases whose facts are practically identical with the present one. In them the respective courts held that there was no substantial difference between public and private schools in relation to the object sought to be accomplished by the zoning ordinance and therefore, in so far as it prohibited the presence of a private school while allowing a public one, it was void. If these decisions were controlling authority upon us we would necessarily affirm the learned trial court for we cannot distinguish them from ours in any material respect. But their authority is persuasive, only, and it fails to persuade.

The subject of public education and the establishment and operation of public schools is a governmental function of this state. Art. X, Wis. Const. Chs. 36 to 42, Stats. The City School Plan, secs. 40.50 to 40.60, Stats., has made the city the municipal entity for the administration of school affairs of those cities which have come under it, as the city of Wauwatosa has done. *State ex rel. Board of Education v. Racine* (1931), 205 Wis. 389, 236 N.W. 553. In the performance of other governmental functions we do not restrict the behavior of persons or the use of property to the same extent that we do when only private interests are pursued and the fact that the standards are different commonly raises no suspicion that an illegal discrimination is thereby imposed or that the difference between municipality and citizen is insufficient to support separate classifications. For example, who considers he has a right to ignore speed laws because they need not be

observed by the fire department responding to a call? Sec. 85.40 (5). Nor is the state controlled by a building requirement which an individual must observe. *Milwaukee v. McGregor* (1909), 140 Wis. 35, 121 N.W. 642. It may be that the essential differences between government and governed are so great that the two are in different classes *per se* at any time when governmental functions are involved and no ordinance is void by reason of discrimination, alone, merely because it gives a preference to the government, acting in its governmental capacity, which it withholds from private corporations or individuals.

However, we decide the present appeal on the narrower ground that tangible differences material to the classifications of the ordinance can be readily pointed out which sustain the distinction made by the ordinance between the schools. To begin with, the term "public" is the antithesis of "private". The public school is not a private one. They serve different interests and are designed to do so. The private school is founded and maintained because it *is* different. Is that difference material to the purpose of zoning? In many respects the two schools perform like functions and in probably all respects concerning noise, traffic difficulties and the other objectionable features already mentioned they stand on an equality, so that in several of the objects of zoning ordinances, — the promotion of health, safety and morals, as laid down by sec. 62.23 (7) (a), Stats., and developed by respondent's brief, we may not say that the two schools differ. But when we come to "the promotion of the general welfare of the community", — "Ay, there's the rub." The public school has the same features objectionable to the surrounding area as a private one, but it has, also, a virtue which the other lacks, namely, that it is

located to serve and does serve that area without discrimination. Whether the private school is sectarian or commercial, though it now complains of discrimination, in its services it discriminates and the public school does not. Anyone in the district of fit age and educational qualifications may attend the public high school. It is his right. He has no comparable right to attend a private school. To go there he must meet additional standards over which the public neither has nor should have control. The private school imposes on the community all the disadvantages of the public school but does not compensate the community in the same n ner or to the same extent. If the private school does . t make the same contribution to public welfare this difference may be taken into consideration by the legislative body in framing its ordinance. If education offered by a school to the residents of an area without discrimination is considered by the council to compensate for the admitted drawbacks to its presence there, that school may be permitted a location which is denied to another school which does not match the offer, and we can not say that such a distinction is arbitrary or unreasonable or that such discrimination between the two schools lacks foundation in a difference which bears a "fair, substantial, reasonable and just relation" to the promotion of the general welfare of the community, which is the statutory purpose of zoning laws in general and of the ordinance in question.

While we have not found any decisions sustaining the public vs. private distinction between schools in zoning cases and respondent has found two to the contrary, *supra*, it has not been difficult to find supporting examples in other activities. Thus, an ordinance permitted only municipal parks in a residence district. A property owner set up a bathing beach ostensibly run as a private

club but actually open to the public. He asserted that it was a park and that there was an illegal discrimination by the ordinance which permitted a municipal park but not a private one. The court said: "There is nothing unreasonable in the classification that makes a distinction between municipally owned and privately owned playgrounds and parks." *McCarter v. Beckwith* (1936), 247 App. Div. 289, 285 N.Y. Supp. 151, 154. The decision was affirmed without opinion, 272 N.Y. 488, 3 N.E. (2d) 882, and was denied certiorari 299 U.S. 601, 57 Sup. Ct. 193, 81 L. Ed. 443.

In *Golf, Inc. v. District of Columbia* (C.C.A.D.C. 1933), 67 Fed. (2d) 575, a corporation established a driving range in a residential area. The ordinance prohibited this activity although it would have been permitted if conducted under public auspices. The corporation contended that the zoning ordinance was void because it made an unreasonable classification. The decision rested on the distinction between public benefit and a more restricted advantage which we make in the instant case.

The headnote states:

> "Zoning regulations *held* not discriminatory because permitting use of lands in residential districts for public recreational purposes while denying to private individuals similar use, * * * "

In the opinion on p. 577 the court said:

> "It is also contended by the corporation that the regulations are discriminatory in that they permit the use of lands in residential zones in the District of Columbia for public recreational purposes, but deny a similar use to private individuals.
>
> "We cannot agree with this contention. A use of public parks or recreational grounds in a residential

> area for the common benefit of all the people of the District is not to be compared with the use of lands by a private corporation for its exclusive profit in a manner forbidden by the zoning regulations."

In *Cincinnati v. Wegehoft* (1928), 119 Ohio 136, 162 N.E. 389, an effort was made to enjoin the city from building a fire house in an area zoned for residential purposes only, except that the ordinance provided that the city was exempt from such restriction as far as the erection of its own municipal buildings was concerned. The court held that this discrimination did not violate the state and federal constitutions.

Even more persuasive is our own leading case on zoning ordinances, *State ex rel. Carter v. Harper, supra.* The ordinance there under consideration contained a provision which allowed a public service corporation, upon a finding of public necessity and convenience, to erect buildings and put its property to use in its business in *any* zone. We said, at p. 162:

> "* * * It must be apparent that an ordinance enacted pursuant to state authority which prevents the erection of buildings or the conduct of business deemed inimical to public interest need not also prohibit the erection of buildings or the conduct of business which is essential to the comfort and convenience of the public and which the duly constituted authority of the state determines to be necessary for the public service which a public utility is required to render. * * *"

The private corporation, because affected by the public interest, was enabled to conduct activities in zones where similar industries not so affected were forbidden to operate. If such preferential treatment of a mere private corporation did not invalidate the ordinance because of

the public interest in the utility, how much stronger is the position of the appellants whose contention rests on an ordinance which gives the preference to the public,—the municipality,—itself! We consider the authority very strong in support of the conclusion which we have already reached independently, that no unconstitutional or otherwise illegal discrimination appears in the Wauwatosa zoning ordinance by reason of its exclusion of private high schools from "A" residence zones while accepting public schools of the same rank. Consequently, the refusal of appellant building inspector to issue a building permit for the erection of respondent's private high school was proper and must be sustained.

By the Court. Orders and judgment reversed. Cause remanded with directions to quash the writ of mandamus.

STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1953

No. 263

STATE EX REL WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,

Respondent,

v.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa,

Appellant,

E. L. VANDERJAGT,

Interpleaded Defendant.

STEINLE, J. (dissenting) The ordinance in question permits the establishment and operation of a public high school within the prescribed zone, but prohibits the erection and conducting of a private high school therein.

The majority say that since there is a substantial distinction between public and private schools in that particularly the public school must serve all, whereas the private school restricts admission, there is no illegal classification under the ordinance, and that the discrimination resulting therefrom is not unreasonable.

Zoning regulations are foundationed on police power. The ultimate purpose of zoning is associated with public health, safety, morals and general welfare.

In *State v. Withrow* (1938), 228 Wis. 404, 280 N.W. 364, this court held that the scope of the police power is confined to the enactment of regulations to promote the public health, safety and welfare.

In *Geisenfeld v. Shorewood* (1939), 232 Wis. 410, 287 N.W. 683, it was held that a zoning ordinance is unconstitutional and void if it is arbitrary and unreasonable and has no substantial relationship to the public health, safety, morals or general welfare of a municipality.

In *State ex rel Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 276 N.W. 311, the court said that in the exercise of police power all classifications must be based upon substantial distinctions which makes one class really different from another.

The primary purpose of our high schools, private or public, is to educate pupils of a particular age. The state is interested to have all such children so educated in order that they may become good citizens. Private high schools as well as public high schools promote the general welfare and there is no substantial distinction in the purpose which they serve. If the private high schools did not exist, the public would be obliged to furnish facilities for those attending the private institutions.

In 47 *Am. Jur.*, Schools, p. 459, sec. 220, the following observation is made:

> " * * * the only difference between a public and private school is that one is organized and maintained as one of the institutions of the state, whereas the other is maintained by private individuals or corporations."

The placement of a private high school in the area in question here would no more offend or interfere with the health, safety, morals and general welfare of the com-

munity than would the presence of a public high school which the city authorities under the ordinance are permitted to erect in the zoned section. As was well said in the case of *Catholic Bishop of Chicago v. Kingery* (1939), 371 Ill. 257, 259, 20 N.E. (2d) 583 at 584:

> "We fail to perceive to what degree a Catholic School of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare. As a matter of fact such a school, conducted in accordance with the educational requirements established by State educational authorities, is promotive of the general welfare."

Other cases holding ordinances of this type invalid on the basis of improper classification are: *Miami Beach v. State ex rel. Lear* (1937), 128 Fla. 750, 175 So. 537; *Lumpkin v. Township Committee of Bernards* (1946), 134 N.J.L. 428, 48 Atl. (2d) 798; *Roman Catholic Archbishop of Oregon v. Baker* (1932), 140 Or. 600, 15 Pac. (2d) 391; *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph* (1942), 139 Ohio St. 229, 39 N.E. (2d) 515; *Women's Kansas City St. Andrew Society v. Kansas City* (8th Cir. 1932), 58 Fed. (2d) 593; *State v. Northwestern Preparatory School* (1949), 228 Minn. 363, 37 N.W. (2d) 370; *Phillips v. Homewood* (1951), 255 Ala. 180, 50 So. (2d) 267; *Yanow v. Seven Oaks Park, Inc.* (1953), 11 N.J. 341, 94 Atl. (2d) 482. See also 8 *McQuillin, Mun. Corp.* (3d ed.), p. 40, sec. 25.15.

It is a rule, as pointed out by the majority, that valid classification for zoning may be based on distinctions between municipal and private property and activities. However, it is significant that the courts of the country

in zoning cases have treated private school situations differently than other endeavors of private enterprise. In the field of education the courts in zoning cases have made an exception to the rule and have not distinguished as between private and public schools. There is good reason for such exception.

Cases cited by the majority, to-wit: *McCarter v. Beckwith* (1936), 285 NYS 151, 3 N.E. (2d) 882 and *Golf, Inc. v. District of Columbia* (1933), 67 Fed. (2d) 575 involve a privately owned park and a privately owned golf driving range, respectively. It seems, however, that there is a substantial distinction between schools and places of recreation. Private schools must comply with state standards in matters of education. Privately owned recreation places need not so comply. By law, schooling is required to a particular age. The state permits such schooling in either public or private establishment. It does not require recreation to be taken in either park or golf range. The private park or golf range is a profit making venture. In the instant situation the owner of the land who petitions for the building permit is a non profit organization.

Since it appears that the private high school which respondent desires to erect on its land in the zoned area is in the same category as the public high schools of Wauwatosa, and of the type which that municipality is free to erect in the zoned section, and that such private high school would serve the same purpose of educating the children of the community and vicinity as do the public high schools of that city, I am forced to the conclusion that the barring of respondent's contemplated project by this zoning ordinance is discriminatory, arbitrary and unreasonable and clearly violative of sec. 1, art. 1, of the Wisconsin Constitution and contrary to art. 1 of the Four-

teenth Amendment of the Federal Constitution and therefore void. I would affirm the judgments of the circuit court.

I am authorized to say that Mr. Justice Broadfoot joins in this dissent.

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
CASE NO. 244-270

STATE OF WISCONSIN, ex rel. WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,
Plaintiff,

vs.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa, Wisconsin,
Defendant.

DECISION

This is an action in mandamus directed to defendant, Sid H. Sinar, Inspector of Buildings of the City of Wauwatosa, Wisconsin, commanding him to issue permits for the construction of a private high school which plaintiff seeks to erect upon property described in the complaint situated in the City of Wauwatosa in an "A" residence district of said City or that he show cause to the contrary. Defendant before the expiration of the time for making return to the alternative writ moved to quash the alternative writ of mandamus issued herein for the "reason that neither the petition herein nor said alternative writ state facts showing that the Wisconsin Lutheran High School Conference is entitled to a writ of mandamus as prayed".

The sole question presented for determination upon the complaint and the motion to quash is as to the constitutionality of that portion of the zoning ordinance of the City of Wauwatosa relating to the validity of section 14.03 (1) (e) of the Wauwatosa Zoning Code which defines "A" Residence District Regulations. The pertinent provision relating to the matter under consideration provides:

> "Subsection (1) Use: No building or premises shall be used and no building shall be hereafter erected or altered within any "A" Residence District, unless otherwise provided in this ordinance, except for the following uses:
>
> (e) Public Schools and Private Elementary Schools."

It is plaintiff's contention that the above provision which only permits the erection of private elementary schools while permitting the erection of public schools (both elementary and high schools) is invalid because it is unreasonable and discriminatory.

To justify the discrimination with respect to private high schools, it must be made to appear that such classification bears a substantial relationship to public health, safety, morals or general welfare. The exercise by the Common Council of its right to pass zoning regulations rests upon the statutory declaration that it must be "for the purpose of promoting health, safety, morals or the general welfare of the community". Section 62.23 (7) (8) Wis. stats.

In *Nectow vs. City of Cambridge,* 277 U.S. 183, the Court in considering this question said:

> " * * * The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not

> unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. * * * ."

Plaintiff in support of its contention that the exclusion of private secondary schools from an "A" Residence District bears no relation to the public health, safety, morals or general welfare has cited the case of *City of Miami Beach vs. State ex rel. Lear,* 128 Fla., 750, 175 So., 537 (1937). In declaring the zoning ordinance void which prohibited private schools in a restricted district, which permitting public schools, the Court said:

> "It will be noted that the ordinance as amended specifically permits the conducting of public schools within the prescribed zone and prohibits the conducting of private schools of all sorts therein. The prohibiting classification finds no formulation or basis in reason or experience that has been brought to our attention. What objectionable characteristics touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in greater degree as to a public school has not been suggested, and, we think, for the very good reason that none exists. For this reason alone the ordinance as amended must be held to be arbitrary."

In *Catholic Bishop of Chicago vs. Kingery,* 371 Ill., 257, the Court, in declaring an ordinance invalid because of unreasonable discrimination between public and private schools, said:

> "We fail to perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school

pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare. As a matter of fact such a school, conducted in accordance with the edcational requirements established by State educational authorities, is promotive of the general welfare."

Further leading cases holding discriminatory ordinances invalid and unconstitutional for similar reasons are the following:

Roman Catholic Archbishop of Oregon vs. Baker, 140 Ore. 600, 15 Pa. 2nd, 391 (1932)

State ex rel. Synod of Ohio of United Lutheran Church vs. Joseph, 139 Ohio St. 229, 32 N.E. 2nd 515 (1942)

Women's Kansas City St. Andrew Society vs. Kansas City, 59 Fed. 2nd, 593 (1932)

Village of University Heights vs. Cleveland Jewish Orphans Home, 20 Fed. 2nd 743, 54 A.L.R. 1008 (1927)

The rule is well established that "zoning ordinances must be uniform and equal in operation and effect, and provide those in similar circumstances among whom no reasonable basis for distinction exists, with equal protection of the law, as is constitutionally required of all ordinances as well as statutes. The classification may and must be reasonable". (McQuillin on Municipal Corporations, 3rd Ed., vol. 8, sec. 25.61)

It must be held that the ordinance of the City of Wauwatosa in question which permits the erection of public schools, both primary and secondary, and permits the erection of private schools elementary only violates the principle that ordinances "must be uniform and equal in

operation and effect" and fails to provide "those in similar circumstances, among whom no reasonable basis for distinction exists, equal protection of the law" as is constitutionally required of all ordinances.

It is further my conclusion that the portion of the ordinance in question (and that portion only) to-wit: Section 14.03 (1) (e) must be held to be invalid because unfairly discriminatory and arbitrary for the reason that the classification bears no substantial relationship to public health, safety, morals or the general welfare as required by statute.

Schools have usually been held suitable in a residence zone; not detrimental thereto.

In *Livingston et al vs. Davis et al.*—Iowa, 15 N.W. 2nd, 592, 27 A.L.R. 2nd, 1237 (1951) the Court stated:

> "Schools have usually been held suitable in a residence zone, not detrimental thereto, and courts have frowned on efforts to remove them therefrom."
>
> *Yokley, Zoning Law & Practice,* sec. 161, pages 317, 318
>
> *Langbein vs. Board of Zoning Appeals,* 135 Conn. 575, 67 Atl. 5, 7.

Defendant seeks to justify the discrimination upon the ground that the "public high schools in Wauwatosa are under the jurisdiction of a Public School District * * * which is a separate legal entity", and is referred to as "a quasi municipal corporation". It is further contended by defendant that the "School District has certain powers and prerogatives with respect to schools with which the municipal government may not interfere". Defendant cites in support of his position the case of *State ex rel. Carter vs. Harper,* 182 Wis. 148.

I am of the opinion that the grounds relied upon by defendant for the obvious discrimination of the ordinance are invalid-and must be rejected.

The petition for an alternative writ of mandamus and said alternative writ state facts showing that the Wisconsin Lutheran High School Conference is entitled to a writ of mandamus.

Defendant's motion to quash the alternative writ is denied. Dated, June 4, 1953.

Otto H. Breidenbach,
Circuit Judge.

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
CASE NO. 244-270

STATE OF WISCONSIN, ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,
Plaintiff,

vs.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa, Wisconsin,
Defendant,

E. L. VANDERJAGT,
Interpleaded Defendant.

OPINION AND DECISION

The case before the Court is an action in mandamus in which the plaintiff seeks to compel the defendant, Sid H. Sinar, Inspector of Buildings of the City of Wauwatosa, Wisconsin, to issue a permit for the construction of a private high school which plaintiff desires to build in an "A" Residence District in the City of Wauwatosa. The permit was denied on the ground that the application did not conform to the City zoning laws.

The City has made a return to the alternative writ of mandamus, and the interpleaded defendant, E. L. Vanderjagt, has filed an answer.

The plaintiff demurred to both the return and the answer on the ground that it appears on the face of each

pleading that such pleading does not state facts sufficient to constitute a defense.

The answer of the interpleaded defendant, Vanderjagt, in paragraph 1 admitted the allegations of paragraphs 1, 2, 3, 4, and 5 of the plaintiff's petition, and denied and alleged as follows:

2. Denies upon information and belief that the plaintiff has an interest in the premises described in paragraph 6 of plaintiff's petition, and alleges on information and belief that the plaintiff will have an interest in the premises only if it is granted a permit to erect a private secondary school and athletic field.

3. Alleges that the City zoning code was enacted in 1929, and since that time the premises in question have been in an "A" Residence District.

4. Alleges that the sole reason the defendant refused to issue a permit was because of a non-compliance with Sec. 14.03 (1) of the zoning code of the City of Wauwatosa.

5. Alleges that the erection of a secondary private school and athletic field will not be for the purpose of educating the children of taxpayers and residents of Wauwatosa, but rather for the benefit of persons residing outoutside of Wauwatosa.

6. Alleges that the erection of a secondary private school and athletic field will not promote the public health, safety, or general welfare of the City of Wauwatosa.

7. Alleges that the denial of plaintiff's petition will not deprive the plaintiff of rights in said property because the plaintiff knew that such property was so zoned for

25 years prior to the time that the plaintiff acquired a contract interest in such property.

As an affirmative defense the interpleaded defendant alleged:

1. That allegations 1 to 7 of this answer are realleged.

2. That the interpleaded defendant and others adjacent to the premises involved herein spent $22,000 to $75,000 for their homes, and the total valuation of the homes in the immediate vicinity of the land in question is in excess of one million dollars.

3. That Wauwatosa has a population of 35,000 people, and has a public high school, and two junior high schools, and an athletic field, in a "B" District, and proposes to build another junior high school in a "B" District.

4. That the zoning code permits the erection of a private high school in a "B" District and in all other Districts except an "A" District.

5. That the high school proposed to be erected will have an approximate enrollment of 500 pupils, of which 30 or 40 will reside in Wauwatosa, and the balance will reside outside of the City of Wauwatosa.

6. That the plaintiff proposes to use the athletic field for night football games and events.

7. That parents of the pupils and others will avail themselves of the facilities of the proposed high school.

8. That increased traffic and parking will result, and confusion in the streets will interfere with adequate transportation.

9. That the surrounding property is adapted for "A" residences, and the proposed school and athletic field will

not encourage the most appropriate use of such adjoining land.

10. That no public high school is located in an "A" District and none will be erected.

11. That the proposed high school and athletic field will be primarily for the benefit of communities other than Wauwatosa and will be under exclusive control of the plaintiff.

12. That the City of Wauwatosa has distributed the burdens of an athletic field and high school in separate locations in a "B" area, whereas the plaintiff will use one location only for both.

13. That additional municipal services will be required if this property is used as prayed for in the petition, and this will be detrimental to a Class "A" District because of depreciated property values and so forth.

The return of the Building Inspector, the defendant herein, was substantially in accordance with the answer of the interpleaded defendant, although such return of the Building Inspector also shows as follows:

1. Admits that the plaintiff has a contract to purchase such real estate.

2. Shows details of development of property in Wauwatosa, and alleges that Wauwatosa might add $2,250,000 of taxable value to the City tax roll if the plaintiff's property was sold for lots, and that this might mean $61,875 additional taxes yearly.

3. That a secondary school located in a residence district results in physical damages to surrounding residence property by reason of trampling and littering of lawns, gardens, and shrubbery.

Many statements in the answer and the return are purely speculative as to the future and are apparently based on what is presumed to take place in the future in case the plaintiff's high school is built.

Many statements outside of the record made in the briefs of the attorneys are not mentioned herein because not applicable. The same is true of certain legal authorities cited in the briefs.

LAW

In *Madregano vs. Wisconsin Gas and Electric Co.*, 181 Wis. 611, it was held that on a demurrer being made to an answer all of the allegations of the answer must be taken as true.

Sec. 263.17, Wis. Stats., holds that pleadings must be given liberal constructions when demurrers are made to such pleadings.

Section 14.03 (1) of the zoning ordinance of the City of Wauwatosa defines the uses which are permitted in an "A" Residence District, and subsection (e) of said section reads as follows: "Public Schools and Private Elementary Schools."

Subsections (7) (a), (b), and (c) of Sec. 62.23, Wis. Stats., are involved herein, and provide as follows:

> "(a) *Grant of power.* For the purpose of promotion of health, safety, morals or the general welfare of the community, the council may by ordinance, regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes pro-

vided that there shall be no discrimination against temporary structures. This subsection and any ordinance, resolution or regulation, heretofore or hereafter enacted or adopted pursuant thereto, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. It shall not be deemed limitation of any power elsewhere granted.

"(b) *Districts.* For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts.

"(c) *Purposes in view.* Such regulation shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

Sec. 14.04 (1) of the Zoning Ordinance permits colleges and private secondary schools in a "B" Residence District.

Sec. 14.23 of the Zoning Ordinance provides that the provisions of the ordinance are severable.

277 U.S. 183, *Nectow vs. City of Cambridge,* at page 188, contains this statement:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

City of Miami Beach vs. State ex rel Lear, 128 Fla. 750, 175 So. 537, contains this statement:

> "The prohibiting classification finds no formulation or basis in reason or experience that has been brought to our attention. What objectionable characteristics touching the comfort or other general welfare of the surrounding community may obtain as to a private school which would not probably obtain in greater degree as to a public school has not been suggested, and, we think for the very good reason that none exists."

371 Ill. 257, 20 N.E. 2d 583, *Catholic Bishop of Chicago vs. Kingery,* contains this statement at page 584:

> "We fail to perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare."

140 Ore. 600, 15 P. 2d 391, *Roman Catholic Archbishop of Oregon vs. Baker,* contains this statement at page 391:

> "The kind of school proposed to be erected will not interfere with the public health; it cannot affect the public peace; it surely will not endanger the public safety; and by all civilized people an educational state law is considered an aid to the general welfare."

McQuillin on Municipal Corporations, 3d Ed. Volume 8, Sections 25.61, 25.99, 25.122, 25.123, and Section 195, hold generally that provisions of zoning ordinances must be uniform and equal in operation as applied to those in similar circumstances among whom no reasonable basis for distinction exists.

Rathkopf, the Law of Zoning and Planning, 2d Ed. contains the following statements:

> "Zoning is an exercise of the police power. The police power furnishes the basis for imposing reasonable zoning restrictions uniformly applicable within a given area, affecting the uses to which the property within such area may be put."
>
> "Any doubt as to the constitutionality is construed strictly against the municipality.
>
> "When the exercise of the police power is proper and reasonable, resulting damage to one's property is one of the prices the individual must pay as a member of society, to the end that the general welfare of the community may be served."

79 N.Y. Supp. (2), *Hickox vs. Griffin,* at page 195, contains a statement to the effect that an equitable owner of real estate is an interested party and a proper party to an action or a proceeding.

37 N.W. 2d 370 (1949), *State vs. Northwestern Preparatory School, Inc., et al,* was a case involving a Minnea-

polis zoning ordinance which allowed public schools and churches and schools accessory thereto, but prohibited private schools, in a certain area, and at page 371 this statement appears:

> "The provisions of the zoning ordinance here involved do not apply equally to public, parochial and privately owned schools. So far as the purposes of the ordinance are concerned, there is no difference between public and parochial schools on the one hand and private schools on the other. While ownership, some of the subjects taught, and the discipline enforced may be different in each from what they are in the others, a private school has no effect upon a residential area different from that of a public or parochial one. The distinction between the different kinds of schools upon which the classification made in the ordinance rests, is not based upon alleged evils which it is claimed exist in the case of private schools and do not exist in the case of public or parochial schools. The distinction is based solely upon ownership. Such a distinction bears no relation to the purposes of the ordinance, and for that reason is arbitrary. The ordinance denies to private schools, the rights which it accords to public and parochial schools under the same circumstances. Thereby the ordinance fails to accord to private schools the equal protection of the law."

20 Fed. 2d 743 (Ohio), *Village of University Heights et al. vs. Cleveland Jewish Orphans' Home,* was a case where an ordinance created a Plan Commission and gave the Plan Commission authority to relax restrictions in certain cases. The defendant sought authority to erect a home for orphans in a residence district. The Plan Commission found that the public convenience and welfare would not be promoted, and denied the application.

At page 745 the Court stated that the objections of the Plan Commission were based on the following grounds:

(1) That the land would be withdrawn from the tax duplicates, resulting in a loss of assessed values to the City; (2) that there would be a larger number of children attending the local school which would require additional accounting and inspection by the board of education; and (3) that the public welfare would be further affected, because in the opinion of the Commission, a school in any community, predominantly attended by the children of a single race, creed or nationality, is hurtful to the community.

The Court held that as applied to this case, the regulation was unreasonable, and the ordinance invalid on the ground that the use was permitted in one instance and denied in another under like circumstances.

384 Ill. 428, 181 N.E. 312, *Kennedy vs. Evanston,* held that property owners may rely on a zoning ordinance unless it is changed for the public good.

94 A. 2d 482, *Yanow vs. Seven Oaks Park Inc. et al,* was a case cited by all of the attorneys in their briefs.

In that case the plaintiff, Yanow, and other residents of an area adjoining property owned by the defendant corporation instituted a suit under a zoning ordinance to prevent the defendant from completing a sale of property to Eastern Christian Institute, a corporation. It was alleged that Eastern Christian Institute was using the property formerly known as Colgate House as a post-high school seminary for the training of ministers, and that nine students boarded there at the time the action was commenced. It was alleged that the ultimate plan was to house 50 students. There was no allegation in the complaint that any of such students would reside in East Orange, New Jersey, the city in which the land was located. The complaint alleged that Colgate House prop-

erty should not be used for any other purpose than a one-family residence dwelling. The Eastern Christian Institute attacked the constitutionality of the zoning ordinance, section 4 of which ordinance permitted public and parochial schools, and section 9 of which ordinance provided as follows:

> "Private schools, clubs, lodges, social community center and recreation buildings, are prohibited, unless the written consent of 80 percent, by frontage, of the owners of all lots within 200 feet of the property in question be filed with the building and plumbing inspector, and unless every application for the erection, enlargement or alteration of any such building shall be approved by the Board of Appeals."

It was provided by statute, Sec. 40:55-32, that the purpose in view of the statute was to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; and avoid undue concentration of population. It was further provided in such statute as follows:

> "Such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality."

The Court in an exhaustive opinion discussed and decided many things which may be summarized as follows:

1. That the provisions of Sec. 9 of the ordinance is invalid.

2. Public and parochial schools were allowed under general school laws.

3. That the terms "public and parochial schools" do not include higher seminaries of learning such as academies or colleges.

4. Parochial schools are in the same category as public schools for zoning purposes. This judicial concept has its foundation in the common law.

5. That public and parochial schools were allowed in the district for the principal purpose of educating the children of the community.

6. At page 489 this statement appears:

> "Eastern has cited decisions of courts in other jurisdictions as support for its contention that the law should be settled in its favor. We find these decisions and others of like import to be readily distinguishable and not dispositive.
>
> "*Catholic Bishop of Chicago vs. Kingery,* 371 Ill. 257, 20 N.E. 2d 583 (Sup. Ct. 1939) is not opposed to our conclusions, for the rationale of the decision there was that where public schools were permitted the exclusion of a parochial school of like category was unreasonable. Compare *Roman Catholic Archbishop vs. Baker,* 140 Ore. 600, 15 P. 2d 391 (Sup. Ct. 1932). To the same effect is *City of Miami Beach vs. State ex rel Lear,* 128 Fla. 750, 175 So. 537, 539 (Sup. Ct. 1937), which related to a multiple dwelling zone."

58 Federal 2d 593, *Women's Kansas City St. Andrews Society vs. Kansas City, Missouri,* was a case which stated that a restriction imposed upon the use of land in a zoning ordinance must bear some substantial relationship to public health, safety, morals, or general welfare. The Court further held that a zoning ordinance may be so clearly arbitrary and unreasonable as to particular property that it is unenforceable.

The restriction in the zoning ordinance was not held applicable against using property for an old ladies home.

90 P. 2d 217, *State vs. Hill,* was a case where a statute provided that written consent of 75% of the owners of surrounding property must be given if property was to be used for a purpose other than residential. This restriction was held invalid as to the erection of a church. The Court further held that each case involving the constitutionality of the zoning law must be determined on its own facts as they appear in the record before the court.

Volume 8 *Words and Phrases,* under the word "Community" held that in ordinary and common usage the word "locality" is synonymous with the word "community", "neighborhood", or "vicinity", citing 139 Fed. 692 (Ohio), *Conley vs. Valley Motor Transit Co.,* and 107 Fed. 2d. 627, *Lukens Steel Co. vs. Perkins.*

140 Wis. 35, *City of Milwaukee vs. McGregor,* et al, was a case involving the building of a state normal school in Milwaukee. The Court held that a legislative act to do a particular thing in a particular way takes precedence over a local or general regulation conflicting therewith.

205 Wis. 207, *City of LaCrosse vs. Elbertson,* held that the power given to a city to pass zoning ordinances must be reasonably exercised but that within the field delegated to the municipality it may go to the boundaries of reason. This case also held that a zoning ordinance may within reason be amended or changed.

205 Wis. 389, *State ex rel Board of Education v. Racine* held that the Board of Education of a city such as Racine is merely an arm of the city government and its contracts are city contracts. The Court further held that the term

"school district" as used in the statutes implies a school system rather than a municipal entity.

222 Wis. 58, *Van Gilder vs. Madison,* held among other things that although municipalities serve their localities in the preservation of the order and the protection of life and property, the discharge of these functions is not a local affair or a matter of local government only but is a matter of state-wide concern and of state government.

223 Wis. 251, *Wis. Telephone Co. vs. City of Milwaukee,* held among other things that the reasonable regulations which a municipality may impose under Sec. 180.17(1), Wis. Stats., are only such as are referable to and within the limits of the police power.

226 Wis. 515, *State ex rel Ford Hopkins vs. Mayor of Watertown,* was a case wherein it was held that the provisions of zoning ordinances are severable.

228 Wis. 404, *State vs. Withrow,* held among other things that in the enactment of ordinances under the police power that the power is confined to regulations which promote the public health, safety, and welfare.

232 Wis. 410, *Geisenfeld vs. Shorewood,* held that a zoning ordinance is unconstitutional and void if it is arbitrary and unreasonable and has no substantial relation to the public health, safety, morals, or general welfare of a municipality.

CONCLUSIONS

The Court finds and concludes as follows:

1. That the right granted to a city council by Sec. 62.23 (a), Wis. Stats., to regulate the location and use of buildings and land for trade, industry, and other purposes, in order to promote the health, safety, morals or the general

welfare of a community, cannot be exercised unreasonably or in an arbitrary manner.

2. That Sec. 14.03(1)(e) of the zoning ordinance of the City of Wauwatosa allows the building of public schools and private elementary schools in an "A" Residence District without regard to the size of the land upon which such schools are built, the number of pupils who might attend such schools, and without regard to the residence of the pupils, or any of them, in attendance. Surely the pupils of a private elementary school might all be nonresidents of Wauwatosa.

3. That even if it be a fact that a public high school might be built anywhere in a municipality regardless of any zoning provisions, this does not change the zoning classification as made by the City Council of Wauwatosa.

4. That nothing appears in the zoning ordinance or in the return of the defendant or the answer of the interpleaded defendant that shows a legal reason or classification for refusing the right to build and maintain a private high school in a "A" Residence District and at the same time allow either a public high school or a private elementary school to be built and maintained in the same district.

5. That no adverse effect on the health, safety, morals, or general welfare of Wauwatosa would result by the building of this private high school.

6. That the general welfare of the residents of the City of Wauwatosa (at least 30 or 40 of them) will be promoted, and the general welfare of other residents of the community residing outside of the corporate limits of Wauwatosa, but adjacent to Wauwatosa, will be promoted.

7. That the question of other uses to which this 13-acre tract of land might be put is immaterial. At least there is no difference as between the use of the land for a public high school, a private elementary school, and a private high school.

8. That there are no issues of fact to be tried herein.

9. That the provisions of Sec. 14.03(1) of the zoning ordinance of the City of Wauwatosa in so far as they allow a public high school and a private elementary school to be built in an "A" Residence District and at the same time prohibit the building of a private high school are unreasonable and discriminatory. Such prohibition is unconstitutional.

10. That to allow the building of a private high school in an "A" Residence District will not adversely affect the general zoning plan of Wauwatosa.

11. That the plaintiff's demurrer to the return of the defendant is sustained on the ground that the return does not state facts sufficient to constitute a defense to plaintiff's cause of action herein.

12. That the plaintiff's demurrer to the answer of the interpleaded defendant is sustained on the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's cause of action herein.

13. That the plaintiff is entitled to the relief demanded in its petition.

14. That proper papers be presented for signing and filing herein in accordance with this opinion and decision.

Dated November 19, 1953.

William C. O'Connell,
Circuit Judge, Presiding.

(i) Copies of Orders and Judgment Appealed From

There is appended hereto, a copy of the order and judgment of the Supreme Court of the State of Wisconsin reversing the orders and judgment of the Circuit Court of Milwaukee County, Wisconsin, and remanding the cause to the said Circuit Court with directions to quash the writ of mandamus.

There is also appended hereto, a copy of the Order of the Supreme Court of the State of Wisconsin denying Appellant's motion for rehearing.

APPENDIX "B"

Remittitur from the Supreme Court of Wisconsin to Circuit Court of Milwaukee County

Be It Remembered, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday, to wit, on the Eleventh day of August A.D. 1953, on the 81st day of the term, to wit: On the 8th day of June A.D. 1954, Present Edward T. Fairchild, Chief Justice, John E. Martin, Grover L. Broadfoot, Timothy Brown, Edward J. Gehl, George R. Currie and Roland J. Steinle, Justices of said Court, the following proceedings were had, Inter Alia, to wit:

STATE OF WISCONSIN ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,

Respondent,

vs.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa, Wisconsin,

Appellant,

E. L. VANDERJAGT,

Interpleaded Defendant and Appellant.

APPEAL FROM CIRCUIT COURT

Milwaukee County, State of Wisconsin

This cause came on to be heard on appeal from the orders and judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration

whereof, it is now here ordered and adjudged by the Court, that the orders and judgment of the Circuit Court of Milwaukee County, appealed from in this cause, be, and the same are hereby, reversed with costs against the said respondent taxed at the sum of Eight Hundred Forty-five Dollars and Eighty-six Cents ($845.86).

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to quash the writ of mandamus.

Justices Broadfoot and Steinle dissent.

State of Wisconsin, Supreme Court, ss.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 16th day of November, A.D. 1954.

ARTHUR A. McLEOD,
Clerk of the Supreme Court
of the State of Wisconsin.

(Costs of Appellant taxed at $382.00

Costs of Interpleaded Appellant
taxed at 463.86

Total .....$845.86)

(Court Seal)

Order Denying Motion for Rehearing

Be It Remembered, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday, to-wit, on the Tenth day of August A.D. 1954, on the Thirteenth day of the term, to-wit: On the Fifth day of October A.D. 1954, Present Edward T. Fairchild, Chief Justice, John E. Martin, Grover L. Broadfoot, Timothy Brown, Edward J. Gehl, George R. Currie and Roland J. Steinle, Justices of said Court, the following proceedings were had, Inter Alia, to-wit:

APPEAL FROM CIRCUIT COURT

Milwaukee County, State of Wisconsin

Filed Dec. 29, 1954
Francis X. McCormack,
Clerk.

STATE OF WISCONSIN ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE,

Respondent,

vs.

SID H. SINAR, Inspector of Buildings of the City of Wauwatosa, Wisconsin,

Appellant,

E. L. VANDERJAGT,

Interpleaded Defendant and Appellant.

The court being now sufficiently advised of and concerning the motion of the said respondent for a rehear-

ing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs.

State of Wisconsin, Supreme Court, ss.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 28th day of December A.D. 1954.

ARTHUR A. McLEOD,
Clerk of the Supreme Court
of the State of Wisconsin.

(Court Seal)

Office - Supreme Court
FILED
MAR 25 195
HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 614

STATE OF WISCONSIN, ex rel
WISCONSIN LUTHERAN HIGH
SCHOOL CONFERENCE,

Appellant,

v.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

HERBERT L. MOUNT,
Special Counsel for City of Wauwatosa, Attorney and Counsel for Sid H. Sinar, Appellee.

HANNERSMITH-KORTHEVER CO. MILWAUKEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 614

STATE OF WISCONSIN, ex rel
WISCONSIN LUTHERAN HIGH
SCHOOL CONFERENCE,

Appellant,

vs.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

To: ERNST J. VON BRIESEN
RALPH M. HOYT
Attorneys of Record for Appellant
135 West Wells Street
Milwaukee 3, Wisconsin

VON BRIESEN & REDMOND, C. R. DINEEN
Counsel of Record for Appellant
710 North Plankinton Avenue
Milwaukee 3, Wisconsin

SID H. SINAR, Appellee in the above entitled cause, moves this Court to dismiss with costs the appeal taken to this Court by State of Wisconsin ex rel, Wisconsin Lutheran High School Conference, Appellant, upon the following grounds:

1. There is no substantial Federal question involved.
2. The main question is one of fact and therefore not reviewable in this Court.
3. The judgment rests upon an adequate non-Federal basis.

Dated this 23rd day of March, 1955.

HERBERT L. MOUNT,
Special Counsel for City of Wauwatosa, Attorney and Counsel for Sid H. Sinar, Appellee.
212 West Wisconsin Avenue
Milwaukee 3, Wisconsin

BRIEF

I. Statement of the Case.

The City of Wauwatosa, Wisconsin (Pop. 35,000) adopted a comprehensive zoning law in 1929 by which there were created 13 classes of land use districts: 5 residential, 2 institutions, 2 shopping, 2 business and 2 light manufacturing. In the highest class residential district (Class 'A'), the ordinance permits "Public Schools and Private Elementary Schools" but makes no limitation in respect to schools in any of the other 12 classes of districts.

Appellant contends that the above quoted exclusion of private *secondary* schools in Class 'A' residence districts denies it the equal protection of the laws and deprives it of its property without due process of law.

Appellant brought suit in the Circuit Court of Milwaukee County for a peremptory writ of mandamus to compel Sid H. Sinar, building inspector and appellee herein, to issue a building permit, notwithstanding the ordinance, for the construction of a proposed high school and athletic stadium on a 13 acre tract located in one of the Class 'A' residence districts of the city. Modern homes adjacent to the tract in question range in value from $25,000.00 to $75,000.00 and represent an aggregate value in excess of $1,000,000.00.

Appellant prevailed in the Circuit Court and a peremptory writ issued. On appeal to the Supreme Court of Wisconsin the judgment was reversed and the peremptory writ of mandamus ordered quashed. (State v. Sinar, 267 Wis. 91; 65 N.W. 2d, 43). This appeal is taken from the decision of the Supreme Court of Wisconsin after denial of rehearing.

II. Sid H. Sinar, appellee herein, objects to the appellant's statement as to jurisdiction heretofore filed and moves to dismiss said appeal on the following grounds:

(a) There is no substantial Federal question involved.

(b) The main question involved is a question of fact and is not reviewable in this Court.

(c) The decision of the state court rests upon an adequate non-Federal basis.

III. Argument.

A. There is no substantial Federal question involved.

The ordinance in question was adopted pursuant to statutory authority. Section 62.23(7), Wis. Stats. provides as follows:

> "(7) Zoning.
>
> (a) Grant of Power. For the purpose of promoting health, safety, morals or the general welfare of the community, the council may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes provided that there shall be no discrimination against temporary structures. This subsection and any ordinance, resolution or regulation, heretofore or hereafter enacted or adopted pursuant thereto, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. It shall not be deemed limitation of any power elsewhere granted.

(b) Districts. For any and all of said purposes the council may divide the city into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts.

(c) Purposes in view. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the over-crowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

The ordinance in question represents a familiar exercise of the state's police power by delegation thereof in broad terms to the subordinate municipalities. Determination of the needs and requirements of local public welfare is properly left to local legislative bodies with due regard for uniformity and reasonableness.

This Court is reluctant to consider constitutional objections to state or local legislation where a determination of public policy or the exercise of legislative judgment in the field of police regulation has occurred.

Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188 (1199), 114 A.L.R. 1487 (Annot. P. 1500).

> "The public policy underlying the passage of a zoning ordinance under provisions of a state statute is a matter to be determined by the municipal governing body.
>
> *State Tax Comm. v. Jackson,* 283 U.S. 527, 75 L. Ed. 1248, 51 S. Ct. 540, 543; 73 A.L.R. 1464; 75 A.L.R. 1536
>
> "The Supreme Court will not substitute its judgment for that of an administrative body (Public Service Comm.) as to wisdom or policy."
>
> *People v. McCall,* 245 U.S. 345; 38 S. Ct. 122; 62 L. Ed. 337.

In *Fischer v. St. Louis,* (194 U.S. 361, 48 L. Ed. 1018), this Court in considering a zoning provision held:

> 1. "The question of the power of a municipality to adopt an ordinance under its charter is not reviewable."
>
> 2. "The question of whether certain acts amount to a violation of a city ordinance is not reviewable."
>
> 3. "The decision of a state court construing such an ordinance does not present a Federal question."
>
> 4. "Neither due process of law nor the equal protection of the laws is denied by a municipal ordinance adopted under legislative authority, forbidding establishment or maintenance of a dairy or cow stable within the city limits without permission of the municipal assembly."

In *Rescue Army v. Municipal Court,* (331 U.S. 549; 91 L. Ed. 1666), this Court again reiterated its general

policy of avoiding decisions of constitutional questions involving local exercise of the police power.

In a case involving the enforcement of an occupational tax alleged to be discriminatory, this Court declared:

> "Rulings by the highest court of the state on questions of state law are conclusive upon the Supreme Court of the United States."
>
> *Independent Warehouses Inc. v. Wm. Scheele,* 331 U.S. 70; 91 L. Ed. 1346.

> "This court has repeatedly held that the inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation."
>
> *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 509; 81 L. Ed. 1245, 1253; 57 S. Ct. 868; 109 A.L.R. 1327.

This is not a case in which the state Supreme Court erroneously understood the applicability of Federal Law hence making the decision reviewable.

> "* * * a fixed interpretation of a state statute should be accepted by the Federal courts when it does not obviously depend altogether upon a misconception of Federal Law."
>
> *Breisch v. Central R. Co.,* 312 U.S. 484; 61 S. Ct. 662; 85 L. Ed. 964

For a comprehensive discussion of the extent to which Federal courts are bound by decisions of state courts of last resort in matters depending upon the construction of state statutes or constitutions see 83 L. Ed. 520 — annotation.

In *Beery v. Houghton,* (164 Minn. 146; 204 N.W. 569; affirmed — 71 L. Ed. 832) this court examined a

zoning ordinance attacked as confiscatory and held on the authority of *Euclid v. Ambler R. Co.,* (47 Sup. Ct. Rep. 114) that "a zoning ordinance must be clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals or *general welfare* before it can be declared unconstitutional." The foregoing case reviews the trend of state decisions toward supporting broad powers and a wide range of discretion by legislative bodies in the exercise of the police power in the field of public welfare and held that

> "If the validity of the classification is fairly debatable the legislative judgment must be allowed to control" citing *Radice v. New York,* 264 U.S. 292, 294; 44 S. Ct. 325; 68 L. Ed. 690.

Berman v. Parker (75 S. Ct. Rep. 98 — advance sheets) was decided November 22, 1954. The District of Columbia, under authority of a slum clearance and housing act, and proceeding under the power of eminent domain proposed to take the business property of petitioner which was inoffensive and not objectionable by aesthetic standards. Petitioner objected on the ground that such taking violated the due process clause of the 5th Amendment. In its decision this court said:

> "Subject to specific constitutional limitations, when a legislature has spoken, public interest has been declared in terms well-nigh conclusive."
>
> "The legislature or Congress, as the case may be, and not the judiciary, is the main guardian of public needs to be served by social legislation."
>
> "Public safety, public health, morality, peace and quiet and law and order do not constitute the entire scope of police power."
>
> "The concept of public welfare is broad and inclusive."

The Court proceeded to cite with approval the language of its decision in *Day-Brite Lighting Inc. v. State of Missouri,* (342 U.S. 421; 72 S. Ct. 405, 407; 96 L. Ed. 469):

> "The Supreme Court does not sit as a super-legislature to weigh the wisdom of legislation or to decide whether the policy which it expresses offends public welfare".
>
> (In the latter case a Missouri statute requiring employers to give employees four hours time without loss of pay on election days was objected to as a violation of the due process and equal protection clauses of the 14th Amendment and the contract clause of Art. I, Sec. 10).

More directly in point is *Lionshead Lake v. Wayne Township,* 10 N.J. 165; 89 Atl. (2d) 693, in which *two justices of the New Jersey Supreme Court dissented,* and in which the appeal to this Court was dismissed for want of a substantial Federal question. (344 U.S. 919; 73 Sup. Ct. Rep. 386; 97 L. Ed. 708).

A zoning ordinance restricted residential areas to buildings of certain minimum "living floor space" and was attacked as not reasonably related to public health, arbitrary and unreasonable, and not within the police powers of the defendant municipality. The zoning ordinance in question was adopted pursuant to authority granted by an enabling statute which permitted municipalities to regulate "the location and use and extent of use of buildings and structures and land for trade, industry, residence or *other purposes*" and to "regulate and restrict the erection, construction, reconstruction, alteration, repair and use of buildings or other structures, and the *nature and extent of the uses of land* within such [zoning] districts."

The purposes prescribed in the New Jersey enabling statute were almost identical with the provisions of the corresponding Wisconsin act. In sustaining the ordinance the New Jersey Court said:

> "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously."

The *Lionshead* case is especially significant because the New Jersey court sustained the regulation of "living floor space" for aesthetic reasons upon the broad ground of general public welfare, — a highly debatable proposition which, until very recently, has been universally disapproved by the courts upon constitutional grounds. Nevertheless, as pointed out above, this Court dismissed the appeal for want of a Federal question although two justices of the New Jersey Court dissented and although the great weight of authority among the state courts was also to the contrary.

The ordinance involved in this appeal represents no more than an effort by the City of Wauwatosa to reasonably regulate the location of private high schools and athletic stadia in the interest of the general public welfare by preventing the impairment and depreciation of existing property values. Its legal right to so regulate is approved by the sovereign State of Wisconsin and it seems quite clear that no Federal question is presented.

B. The main question involved is a question of fact and is not reviewable in this Court.

It must be presumed upon this appeal that the legislative body enacted the ordinance in question with one or more of the "purposes in view" as prescribed in the enabling statute. (Sec. 62.23(7)(c)). This subsection, among other things, permits the adoption of zoning laws "to promote * * * the general welfare," and directs the municipal legislative body to consider "* * *" the *character of the district* and its peculiar suitablity for particular uses, * * * with a view to *conserving the value of buildings* and encouraging the most appropriate use of land throughout such city." All such matters involve the determination of facts by the local legislative body in accordance with the mandate of the statute and the said body *has* determined that the provision to compel private high schools and appendant athletic fields to locate in any of the 13 classes of districts *except* Class 'A' residential, will "conserve the value of buildings" and "promote the general welfare."

This determination of fact was approved and confirmed by the Wisconsin Supreme Court in the following language:

> "Appellants have made it abundantly clear that respondent's projected school has many features which seriously impair the social and economic benefits to the entire community which the zoning law is designed to preserve and promote. It will add to the congestion of the surrounding streets. Athletic events will bring noisy crowds and if the contests are held at night, there will be bright lights to interfere with the peace and comfort of the neighborhood. The school property will be taken from the tax roll, thus increasing the financial burden of the city's taxpayers. The presence of the school will

> lessen the taxable value of nearby homes and will deter the building of new homes in the area." *(State v. Sinar,* 65 N.W. 2d 43, 46.)

We contend that the foregoing findings of fact lawfully made pursuant to a valid state statute is sufficient to support the judgment of the Wisconsin Court.

In *Minneapolis & St. Louis R. Co. v. Minnesota,* (193 U.S. 53 (64-65), 24 S. Ct. 396; 48 L. Ed. 614) the decision of the Minnesota Supreme Court depended upon a finding of fact of "public necessity" as to an order of the state Railroad Commission to compel plaintiff to erect a depot. Plaintiff claimed the order was so unreasonable as to amount to a deprivation of plaintiff's property without due process of law. The U.S. Supreme Court held that the finding of "public necessity" by affirmance in the state Supreme Court left no substantial Federal question on appeal.

The above case was cited with approval in *Hendersonville Light & Power Co. v. Blue Ridge In. Ry. Co.* (243 U.S. 568; 37 S. Ct. 441; 61 L. Ed. 905) in which this Court held that a condemnation of land based upon a finding of "public necessity" in the court below was not a denial of due process of law.

In *Pure Oil Co. v. Minnesota,* (248 U.S. 158; 39 S. Ct. 35, 63 L. Ed. 180) this Court concluded that findings of fact by a state court that certain legislation promoted public safety will not be disturbed but will be accepted as conclusive by the U.S. Supreme Court.

In a case involving the validity of assessments of benefits and damages under the police power of a municipality challenged on constitutional grounds, this Court declined to review for the reason that the issue was primarily one

of fact. (*Willoughby v. Chicago,* 235 U.S. 45; 35 S. Ct. 23; 59 L. Ed. 123)

Prevention of the diminution of property values is a proper consideration in the enactment of zoning laws. 117 A.L.R. 1127—N 28.

C. The decision of the state court rests upon an adequate non-Federal basis.

Under this subdivision we propose to discuss the appellant's claim of discrimination and denial of equal protection of the laws which we contend is unsupported by any Federal authorities and does not raise a substantial Federal question. The U.S. Supreme Court will not review a decision of a state court if it rests upon adequate, tenable state grounds even though a Federal question is presented and preserved. *McCarter v. Beckwith,* 285 N.Y. Supp. 151, 3 N.E. 2d 882; Certiorari denied, 299 U.S. 601; 57 S. Ct. 194; 81 L. Ed. 443.

The gist of appellant's contention is that since the ordinance prohibits private secondary schools in Class 'A' residential districts but fails to prohibit public secondary schools in such districts there is an illegal classification and therefore discrimination in the constitutional sense. *It is not claimed that any public secondary school exists in any such district.* Indeed, the answer of the interpleaded defendant alleges that no public high school is located in an 'A' residential district, (App. Br. 44). (This fact was admitted by appellant's demurrer to said answer.)

There is no conflict in the authorities as to the rule that valid classification for zoning may be based on distinctions between municipal and private property and

activities. It is elemental that illegal discrimination can be said to occur only when the parties involved are "similarly situated" and that any reasonable distinction or difference is adequate ground for classification. These rules are recognized in the dissenting opinion of the Wisconsin Court (App. Br. 32) but the author (Mr. Justice Steinle) urges that there should be an exception to the rule in the case of schools. However, many other conceivable exceptions could be urged with equal facility and there would soon be no rule.

We believe the correct rule to be that unlawful discrimination in the constitutional sense does not occur when the relationship between the parties is that of governor and governed and that a municipality can, by means of a zoning law, prohibit the use of certain land for any specific private purpose but use the same or similar land for an identical public purpose when such a public purpose is connected with the discharge of a governmental function. *McCarter v. Beckwith,* (supra).

> "In *Golf Inc. v. District of Columbia,* (67 Fed. 2d 575) a corporation established a driving range in a residential area. The ordinance prohibited this activity although it would have been permitted if conducted under public auspices. The corporation contended that the zoning ordinance was void because it made an unreasonable classification. The decision rested on the distinction between public benefit and a more restricted advantage which we make in the instant case."
>
> "The headnote states:
>
> > 'Zoning regulations *held* not discriminatory because permitting use of lands in residential districts for public recreational purposes while denying to private individuals similiar use, * * *

"In the opinion on P. 577 the court said:

'It is also contended by the corporation that the regulations are discriminatory in that they permit the use of lands in residential zones in the District of Columbia for public recreational purposes, but deny a similar use to private individuals.

We cannot agree with this contention. A use of public parks or recreational grounds in a residential area for the common benefit of all the people of the District is not to be compared with the use of lands by a private corporation for its exclusive profit in a manner forbidden by the zoning regulations.'

"In *Cincinnati v. Wegehoft* (1928),(119 Ohio 136, 162 N.E. 389), an effort was made to enjoin the city from building a fire house in an area zoned for residential purposes only, except that the ordinance provided that the city was exempt from such restriction as far as the erection of its own municipal buildings was concerned. The court held that this discrimination did not violate the state and federal constitutions." (From decision in State v. Sinar, supra)

There is a valid distinction under zoning laws where an exclusive use is permitted to the city for purposes connected with its governmental functions. *117 A.L.R. 1146.* The rule was held to apply to the construction of a water tower, *(Wallerstein v. Westchester,* 1 N.Y.S. (2d) 111), public parks and playgrounds, (*Decatur Park District v. Becker* (1938) 368 Ill. 442; 14 N.E. (2d) 490), and to a public dump and rubbish incinerator *(DePalma v. Town Planning Comm.,* 123 Conn. 257, 193A. 868.

American University v. Prentice, 113 Fed. Supp. 389, affirmed in *Prentice v. American University,* 214 Fed. 2d 282, cited by appellant involved a clear abuse of the

zoning power. In that case the District of Columbia Zoning Commission *deliberately rezoned* the university campus to prevent its use for the construction of a hospital. The Federal court properly held that the purpose of the regulation (which amounted to "spot Zoning") had no reasonable relationship to public health, morals or general welfare.

But the trend in the decisions is distinctly in the direction of permitting the establishment by zoning laws of exclusive residential districts even to the exclusion of churches. In *Church of Latter Day Saints v. City of Porterville,* 90 Cal. 2, 656; 203 Pac. 2d, 917, the California Supreme Court ruled that the exclusion of churches from certain residential districts was valid and did not constitute an unwarranted restriction of religious worship. This case discusses and upholds the several rules and presumptions heretofore discussed in this brief.

Appellant's claim of unconstitutionality based upon deprival of property without due process of law is hardly reasonable in a case of this kind where the record shows that appellant's acquisition of the property was just before commencement of this action and with full knowledge of the legal impediments. The constitutional amendment in question was not adopted to allow persons to knowingly assume a vulnerable position contrary to law and then invoke the constitution to extricate them from such position. This should be especially true in an equitable case in which the appeal is made to the court's conscience and the plaintiff presumably has become an innocent victim of an alleged unconstitutional regulation.

CONCLUSION

It is respectfully submitted that the Supreme Court is without jurisdiction as to the issues presented by this appeal. The decision appealed from rests primarily upon findings of fact legally determined by a competent legislative body acting pursuant to a valid enabling state statute which findings were approved and confirmed by the Wisconsin Supreme Court; that the decision therefore rests upon adequate tenable state grounds of law and fact and that the claim of illegal discrimination is untenable, unsupported by sufficient Federal precedent and presents no substantial Federal question. The appeal should therefore be dismissed.

Respectfully submitted,

HERBERT L. MOUNT,
Special Counsel for City of Wauwatosa, Attorney and Counsel for Sid H. Sinar, Appellee.

April 5, 1955

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In re: State ex rel WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE, Appellant
vs.
SID H. SINAR, Inspector of Buildings et al,
Appellees

October Term 1954

No. 614

Dear Sir:

Our motion to dismiss the above appeal and our brief in support of said motion were served on March 23, 1955, and forty printed copies filed in your office a few days later in accordance with the rule. Since the preparation of said brief, a case has come to our attention which is directly in point on all fours with the facts and issues in the instant appeal.

We desire to call this decision to the attention of the Supreme Court of the United States with the feeling that it may be helpful to the Court in arriving at a decision on the motion to dismiss and we enclose herewith ten copies of this letter which we trust can be accepted as a supplemental memorandum.

In re: Great Neck Community School was decided by the New York Circuit Court of Nassau City on March 16, 1955. A municipal Zoning ordinance barred private schools from certain residential areas although permitting public schools in [illegible] area and the Court held that such regulation is not invalid or unfairly discriminating against private schools.

Following are excerpts from the decision:

"The state has not subordinated to the villages its right to determine where its school buildings are to be located and the villages have no right to control the paramount power of the state. The villages themselves spring into being by leave of the state and must operate within their delegated authority."

"Private schools are different. They are aiding, under state supervision, in the necessary and important function of education, but they are not the state in action. They do not, for example, possess the power of eminent domain. Nor are they empowered to cause a tax to be voted upon by the people. They are managed by persons elected in elections by citizens of the state. In short, private schools are something less in prerogatives than in the public schools. There is thus a valid basis for denying to a village the power to control by zoning regulations the state school system by granting to the village the power to set aside areas by zoning regulations in which private schools are not permitted. * * * *"

Very truly yours,

Herbert L. Mount

Herbert L. Mount
Attorney for Appellees

HLM:am

FILED
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HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 614

STATE OF WISCONSIN, ex rel
WISCONSIN LUTHERAN HIGH
SCHOOL CONFERENCE,

Appellant,

vs.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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IN THE

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STATE OF WISCONSIN, ex rel
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Appellant,

vs.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

I. NATURE OF THIS BRIEF

This is appellant's brief in opposition to the motion by appellee, Sinar, to dismiss the appeal.

II. ISSUE

Has the appellee set forth sufficient grounds to sustain its motion to dismiss?

III. THE CONTENTIONS

A. The appellee has moved to dismiss the appeal upon the following grounds:

1. There is no substantial federal question involved.
2. The main question is one of fact and therefore not reviewable in this Court.
3. The judgment rests upon an adequate non-federal basis.

B. The appellant contends that the motion to dismiss must fail because:

1. There is a substantial federal question involved.
2. The main question is not one of fact; and in any event this is not a ground under the Rules of the Supreme Court of the United States governing motions to dismiss appeals.
3. The validity of the Wisconsin Statute having been challenged as repugnant to the federal constitution and having been declared valid, the judgment rests upon a federal question only.

IV. ARGUMENT

A. The Substantiality of the Federal Question Involved.

Although we feel that many of the cases cited by the appellee and many of the propositions averred by it are not to the point of the motion, nevertheless they are considered here, insofar as they deal with the procedural point which is at issue rather than with the merits of the matter, in the order in which they appear in appellee's brief.

The opinion of the Supreme Court of Wisconsin in the instant case stated (267 Wis. 91, at page 96, 65 N.W. 2nd 43, at page 46, Statement of Jurisdiction page 23):

> "Respondent submits, therefore, that [the ordinance's discrimination] * * * is a measure which denies to respondent the equal protection of the laws and deprives it of property without due process of law, contrary to the provisions of the 14th Amendment of the United States Constitution."

and the Court further stated (267 Wis. at page 101, 65 N.W. 2d at p. 48, Statement of Jurisdiction p. 29):

> "We consider the authority very strong in support of the conclusion which we have already reached independently, that no unconstitutional or otherwise illegal discrimination appears in the Wauwatosa zoning ordinance by reason of its exclusion of private high schools from "A" Residence Zones while accepting public schools of the same rank."

None of the cases cited by the appellee in his argument that there is no substantial federal question involved can detract from the Wisconsin Court's clear statement that the 14th Amendment of the federal constitution is involved.

In general, the cases cited by the appellee under this heading only support the doctrine, well settled, that the legislature, not the courts, are the judges of the wisdom or the public policy of a legislative enactment. Only one of the cases cited (*Lionshead Lake v. Wayne Township*, 10 N.J. 165; 89 Atl. (2d) 693) is an example of a case dismissed for want of a substantial federal question, which is the sole issue to be treated under this heading. We comment upon the appellee's cited cases in order as follows:

1. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 82 L. ed. 1188 (1199), 114 A.L.R. 1487 (Annot. P. 1500), no question arose as to the constitutionality of the Pennsylvania law which the court held was to be applied by the federal court. No federal substantive statute or constitutional provision was involved.

2. In *State Tax Comm. v. Jackson,* 283 U.S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 543; 73 A.L.R. 1464; 75 A.L.R. 1536, this court sustained a state tax statute because, it held, it treated upon a similar basis all owners of chain stores similarly situated. In the instant case, the Wisconsin Court does not treat upon a similar basis all owners of high schools. The statement quoted in appellee's brief as to the determination by the legislative body as to public policy is not here material nor controverted.

3. Likewise the quoted portion of the statement from *People v. McCall,* 245 U.S. 345; 38 S. Ct. 122; 62 L. ed. 337, is not controverted by the appellant here, because it is not material. But we point out that, of the sentence quoted by appellee, an important portion was omitted, and reads:

> "* * * yet [the Court] will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the Federal constitutional right claimed has been denied; as, in this case, whether there was such a want of hearing or such arbitrary or capricious action on the part of the commission as to violate the due process clause of the constitution."

4. While the mere *construction* of an ordinance does not present a federal question, the Supreme Court in *Fischer v. St. Louis* (194 U.S. 361, 48 L. ed. 1018) considered whether the ordinance as construed was invalid as repugnant to the federal constitution. The appeal was

not dismissed for want of a federal question, but was heard, to consider the federal question.

5. Although the Court accepted the appeal in *Rescue Army v. Municipal Court,* (331 U.S. 549; 91 L. ed. 1666), it did not pass upon the federal questions because serious problems as to the *construction* of the city ordinance there involved had not been resolved at the state level.

6. The ruling in *Independent Warehouses Inc. v. Wm. Scheele,* 331 U.S. 70; 91 L. ed. 1346, quoted by appellee (which was not the Court's statement, but only the reporter's headnote) had to do with the alleged illegality of a municipal tax as against *the state laws* governing taxation. No similar question is present in the instant case.

7. The federal question *was* considered in *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 509; 81 L. ed. 1245, 1253; 57 S. Ct. 868; 109 A.L.R. 1327; there was no dismissal for lack of any federal question.

8. No constitutional question was involved in *Breisch v. Central R. Co.,* 312 U.S. 484; 61 S. Ct. 662; 85 L. ed. 964, but only the *interpretation* of a state statute.

9. This Court did not dismiss for lack of a federal question the appeal from the Minnesota Supreme Court in *Beery v. Houghton,* (164 Minn. 146; 204 N.W. 569; 273 U.S. 671.)

10. *Radice v. New York,* 264 U.S. 292, 294; 44 S. Ct. 325; 68 L. ed. 690, cannot properly be cited to the proposition of dismissal for lack of substantial federal question —the court did not dismiss the case, but *considered* that the legislature had a basis for finding that night work as a waitress was unhealthy and unsafe and that the state could therefore legislate against it.

11. In *Berman v. Parker,* 75 S. Ct. Rep. advance p. 98, 99 L. ed. (Advance p. 63), this Court by hearing the case indicated that it felt the federal question involved was substantial despite its recognition of the legislature's authority, thus establishing that the legislative declaration does not preclude examination of the federal question.

12. *Day-Brite Lighting Inc. v. State of Missouri,* (342 U.S. 421; 72 S. Ct. 405, 407; 96 L. ed. 469) was cited as another example of the proposition that the legislature may decide policy, the wisdom of which is not subject to Supreme Court review; but this Court *considered* carefully the contention as to the repugnancy of this statute to the federal constitution. The appeal was not dismissed for lack of a substantial federal question.

13. *Lionshead Lake v. Wayne Township,* 344 U.S. 919; 73 Sup. Ct. Rep. 386; 97 L. ed. 708, 10 N.J. 165; 89 Atl. (2d) 693, is the only case cited by appellee which, in fact, was dismissed for want of a substantial federal question. The report of this United States Supreme Court case gives no further explanation for the dismissal. An examination of the New Jersey decision shows no mention made of the federal constitution and no contention made of deprivation of property without due process nor lack of equal protection of the laws. The absence of these contentions and of a specific mention of the federal constitution would clearly be grounds for dismissal in the United States Supreme Court for want of a substantial federal question. These contentions and the provisions of the federal constitution were not omitted in the instant case, but were strenuously urged upon the Wisconsin Supreme Court.

14. Appellee has referred to *Euclid v. Ambler R. Co.* (272 U.S. 365, 47 Sup. Ct. Rep. 114, 71 L. ed. p. 303)

on page 8 of its brief. It is noteworthy that this leading case upon the question of the constitutionality of municipal zoning ordinances mentions that there was nothing in the record of that particular case having to do with schools and churches, libraries, and other public and semi-public buildings and, consequently, the court said, on pages 309 and 310 of 71 L. ed. and on page 385 of 272 U.S.:

> " • • • the provisions of the ordinance in respect of these uses may therefore be put aside as unnecessary to be considered".

The instant appeal, in raising a federal question with reference to schools, previously omitted from consideration in what is generally considered to be the leading case on the subject, now presents not only a federal question but a substantial question which this court has not heretofore passed upon directly.

B. Appellee's Contention That the Main Question Involved is a Question of Fact.

We find no rule or law which provides that this contention is a ground for dismissal.

Although this is not a ground for dismissal of the appeal, we discuss herein, in the order cited by the appellee, the cases cited by it.

1. *State of Wisconsin, ex rel Wisconsin Lutheran High School Conference v. Sinar* is the instant case. Appellee makes the surprising contention that the Wisconsin Supreme Court decided this case upon the facts determined by it (by virtue of demurrer to the defendant's return to the petition for writ of mandamus) concerning the private school, as contained in the portion of the opinion quoted by appellee. These facts cannot possibly be the

basis of the decision when the rest *of that paragraph,* omitted by appellee from its quotation, is stated. The omitted portion, which is the crux of the thought, and which completely deflates appellee's argument, reads:

> "Other detriments are easily thought of, but as respondent points out, *each such discordant feature attends the presence of a public school to an equal degree.*" (Italics supplied)

State of Wisconsin, ex rel Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, p. 96, 65 N.W. 2d 43, p. 46; Statement of Jurisdiction, p. 23. Clearly such findings of fact which apply equally to the private and the public school could not be and were not the basis for the judgment of the Wisconsin Court.

2. In *Minneapolis & St. Louis R. Co. v. Minnesota,* (193 U.S. 53, 24 S. Ct. 396; 48 L. ed. 614) the United States Supreme Court recognized the validity of the findings of fact and also recognized the need for taking jurisdiction to *consider* whether the legislative or administrative body had exceeded its powers and violated the safeguards of the federal constitution.

3. The court in *Hendersonville Light & Power Co. v. Blue Ridge Int. Ry. Co.* (243 U.S. 568; 37 S. Ct. 441; 61 L. ed 905) cited the *Minneapolis & St. Louis R. Co. v. Minnesota* (supra) only to show that the United States Supreme Court had the right to hear the appeal because the mere raising of the federal constitutional question in the Minnesota court created a *substantial* federal question. Of course, it is this very contention which we assert as a reason why the United States Supreme Court should entertain the appeal in the instant case.

4. In *Pure Oil Co. v. Minnesota,* (248 U.S. 158; 39 S. Ct. 35, 63 L. ed. 180), the findings by the Minnesota court, considered binding on the United States Supreme

Court, nevertheless did not preclude the appeal to this Court.

5. The United States Supreme Court dismissed the appeal in *Willoughby v. Chicago,* 235 U.S. 45; 35 S. Ct. 23; 59 L. ed. 123, for the reason that the issue was one of *construction of the state statute.* This has no analogy whatever to the instant case.

C. Appellee's Contention That the Wisconsin Judgment Rests on an Adequate Non-Federal Basis.

The necessary effect of the Wisconsin judgment, after the validity of the statute was challenged as being repugnant to the federal constitution, was to deny the claim of invalidity. The decision, therefore, rests squarely upon the federal question. To hold that this is not reviewable in the United States Supreme Court merely because Wisconsin held the statute to be constitutional would be to discard the guarantees set forth in the United States Constitution. In view of the challenge to the constitutionality and in view of the language of the Wisconsin Supreme Court in the instant case, it must be amply apparent that the judgment does not rest on any non-federal basis. Cyclopedia of Federal Procedure, 3d Edition, § 57.188, pp. 285, 287.

1. Appellee fails to point out under this heading any other than a federal basis which was or could have been the basis for the Wisconsin decision. Appellee cites *McCarter v. Beckwith,* 285 N.Y. Supp. 151, 3 N.E. 2d 882; Certiorari denied, 299 U.S. 601; 57 S. Ct. 194; 81 L. ed. 443, for the proposition that even though a federal question is presented and preserved, this Court will not review a state court decision resting upon adequate tenable state grounds. The case does not so hold. *McCarter*

v. Beckwith (supra) came to the United States Supreme Court on a writ of certiorari which was denied, with no reason given. However, the appellee assigns a reason which we feel is unjustified: The trial court found as facts that there were several bases upon which public beaches could be distinguished from private beaches; the New York Court of Appeals affirmed, per curiam, without opinion; the report of the case fails to show that a federal constitutional question was before the trial court.

2. Appellee cites *Golf Inc. v. District of Columbia* (67 Fed. 2d 575) to support the contention that a finding as to the distinctions between public and private purposes is sufficient for a determination of the question and that no federal question then arises. Ample refutation of this is found in the numerous cases cited by appellant in its Statement of Jurisdiction (pages 12, 13, 14, 15 and 16) wherein all the state courts that have dealt with the subject of schools in zoning ordinances have found that the ordinances in question restricting private schools were invalid *because repugnant to the federal constitution.*

3. Likewise *Cincinnati v. Wegehoft* (1928), (119 Ohio 136, 162 N.E. 389), not having to do with schools and no appeal having been attempted therefrom, can hardly be considered as authority for the statement that no federal question is involved in the instant decision.

4. In *Wallerstein v. Westchester,* 1 N.Y.S. (2d) 111, and *Decatur Park District v. Becker* (1938) 368 Ill. 442; 14 N.E. (2d) 490, the courts permitted the erection of structures not even provided for in the zoning ordinance. In the one, a combination of municipalities erected a water tower and in the other a park district condemned land for park purposes. In neither case was the municipality whose land was involved the owner of the public

or semi-public structure or use which, it was held, the zoning ordinance could not prohibit. In neither of these cases or in *DePalma v. Town Planning Comm.*, 123 Conn. 257, 193A. 868, was there an attempt to appeal to the United States Supreme Court. They cannot be cited to support dismissal of such an appeal, therefore. *American University v. Prentice,* 113 Fed. Supp. 389, and *Prentice v. American University,* 214 Fed. 2d 282, were discussed in appellant's Statement of Jurisdiction.

The case of *Church of Latter Day Saints v. City of Porterville,* cited in appellee's brief as being 90 Cal 2, 656; 203 Pac. 2d 917,[1] was appealed to this court, 338 U.S. 805, 94 L. Ed. 487, but does not support the proposition set forth under this heading of appellee's brief. In dismissing the appeal this court found no substantial federal question present. The court did *not* declare that the California judgment rested on an adequate non federal basis. Unlike the plaintiff in the instant case, the plaintiff in the California case was not discriminated against, and there was no question of unequal protection of the laws. Appellee states that *Church of Latter Day Saints v. City of Porterville* discusses and upholds the several rules and presumptions theretofore discussed in its brief. We find no discussion of *any* presumption and the contention as to discussing and upholding "the several rules" is too vague to merit answer.

V. CONCLUSION

The appellee's motion to dismiss the appeal should be denied because:

a. The appellee fails to show that this appeal does not present a federal question and fails to show that it is

[1]The correct citation appears to be: 90 Cal App 2d 656, 203 P 2d 823.

not a substantial federal question since the Wisconsin Court rested its decision squarely upon the federal constitutional question; the question is a substantial one (and the sole one) because the United States Supreme Court has not yet passed upon this issue and because of all the state supreme courts that have passed upon it Wisconsin's is the only one that has not considered the restrictive ordinance to be unconstitutional.

b. The appellee has completely failed to indicate that the Wisconsin judgment rests upon an adequate or, in fact, any, non-federal basis. If the judgment of a state court that the state's statute is constitutionally valid were to give such judgment, per se, a non-federal basis, then the safeguards in the United States constitution to protect life, liberty and property would be completely ineffective.

c. The appellee's contention that a question of fact, only, is here involved and hence this case is not reviewable by this Court, is not a ground for dismissal of the appeal under the Rules of the Supreme Court; and if it were, is not supported by the law nor the cases cited.

Respectfully submitted,

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No. 614. WISCONSIN EX REL. WISCONSIN LUTHERAN HIGH SCHOOL CONFERENCE *v.* SINAR, INSPECTOR OF BUILDINGS, ET AL. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a sub-